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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 JENNIFER ECKHART, ET AL.,

5 Plaintiffs,

6 v.

20 CV 5593 (RA)
Telephone Conference

7 FOX NEWS NETWORK, LLC, ET AL.,

8 Defendants.

9 -----x

New York, N.Y.
October 7, 2020
3:02 p.m.

10 Before:

HON. RONNIE ABRAMS,

District Judge

12 APPEARANCES VIA TELEPHONE

13 WIGDOR LLP

Attorneys for Plaintiff Eckhart

14 BY: MICHAEL J. WILLEMIN
15 RENAN F. VARGHESE

16 VALLI KANE & VAGNINI, LLP

Attorneys for Plaintiff Areu

17 BY: ROBERT J. VALLI, JR.
18 JAMES VAGNINI
MATTHEW L. BERMAN
SARA W. KANE

19 PROSKAUER ROSE LLP

Attorneys for Fox News Defendants

20 BY: KATHLEEN M. McKENNA
21 KEISHA-ANN G. GRAY
LLOYD B. CHINN

22 MORVILLO, ABRAMOWITZ, GRAND, IASON & ANELLO P.C.

Attorneys for Defendants Henry, Hannity

23 BY: CATHERINE FOTI
24 ELKAN ABRAMOWITZ
JAYNE WEINTRAUB
25 DOUGLAS CHALKE

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

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(The Court and all parties appearing telephonically)

THE COURT: This is Judge Abrams on the line. Who do we have?

MR. VAGNINI: Good afternoon, Judge. This is James Vagnini for the Plaintiff Areu.

THE COURT: All right. Good afternoon.

Why don't we start over. So we're here for Eckhart and Areu v. Fox News Network, et al. So why don't I hear the appearances of the attorneys, please. So again, for plaintiff?

MR. WILLEMIN: This is Michael Willemmin, Wigdor LLP, for plaintiff Jennifer Eckhart. I believed I'm joined by my colleague, Renan Varghese from Wigdor LLP as well, and there shouldn't be anyone else from our firm on for Ms. Eckhart.

THE COURT: Good afternoon. And for Ms. Areu, please, again.

MR. VALLI: Good afternoon, your Honor. It's Robert Valli, V-a-l-l-i, Valli Kane and Vagnini, and with me will be James Vagnini, Matthew Berman and, I believe, Sara Kane will be on but I'm not sure if she will be speaking.

THE COURT: All right. Thank you. Good afternoon.

And for the defendants, please.

MS. McKENNA: For the Fox News defendants, your Honor, good afternoon, this is Kathleen McKenna from Proskauer Rose, and I'm joined by my partners Lloyd Chinn and Keisha-Ann Gray.

THE COURT: Good afternoon.

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1 MR. ABRAMOWITZ: And for Edward Henry, this is Elkan
2 Abramowitz. I'll be joined by Catherine Foti and Douglas
3 Chalke. Ms. Foti will be doing the speaking.

4 THE COURT: Thank you.

5 MS. WEINTRAUB: And Jayne Weintraub on behalf of Ed
6 Henry, as well and Ms. Foti will be speaking for Mr. Henry.

7 THE COURT: All right. So thank you, all for
8 appearing by telephone today. I just want to remind everyone
9 that this is a public proceeding; so members of the public and
10 the press are able to access the proceedings through the public
11 call-in number. All participants are, however, reminded that
12 any recording or rebroadcasting any portion of this proceeding
13 is prohibited.

14 So we're here today primarily to talk about the issue
15 of severance; although, I want to talk a little bit about
16 scheduling. So I've reviewed the letters that you've submitted
17 to the Court this week and last. It's my understanding that
18 defendants no longer oppose the motion to sever the two
19 plaintiffs' cases, as long as it doesn't affect the rule 11
20 motion or the timing of the Eckhart case. Is that correct?

21 (Indiscernible crosstalk)

22 MS. FOTI: This is Catherine Foti. That is correct on
23 behalf of Mr. Henry.

24 MS. McKENNA: And Ms. McKenna on behalf of the Fox
25 defendants. It's correct with respect to our position on the

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1 rule 11. The scheduling concern, I think, was Mr. Henry's and
2 not the Fox defendants.

3 THE COURT: That's correct. All right.

4 Okay. I just want to confirm, as well, that both of
5 the plaintiffs consent and are seeking this severance?

6 MR. WILLEMIN: This is Michael Willemin, on behalf of
7 plaintiff Eckhart, and we do consent and are seeking a
8 severance. Obviously, notwithstanding our position that the
9 cases were brought properly together, but that is correct, your
10 Honor.

11 THE COURT: Okay.

12 MR. VALLI: And the same for plaintiff Areu, your
13 Honor.

14 THE COURT: If I sever the cases, how does it affect
15 subject matter jurisdiction? I am going to remind everyone to
16 state their name before they speak, please.

17 MR. VALLI: This is James Valli for plaintiff Areu.
18 Your Honor, we have subsequently received and have provided the
19 Court with plaintiff Areu's right-to-sue letter under Title
20 VII.

21 THE COURT: One more question. Is there any dispute
22 that the law permits defendants to seek sanctions against
23 Wigdor, even if Wigdor is no longer Ms. Areu's counsel? So I'm
24 going to turn to that question. Yes, go ahead.

25 MR. WILLEMIN: Yes, this is Mr. Willemin, on behalf of

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1 Ms. Eckhart and on behalf, in this case, of Wigdor.

2 We don't believe -- So the fact that these cases are
3 severed and the fact that we are -- well, the fact that these
4 cases are severed does not impact the defendants' ability to
5 seek sanctions. As laid out in correspondence to the Court
6 prior to our last conference, the fact that Ms. Areu disengaged
7 us as counsel prior to the expiration of the 21-day safe harbor
8 period does prohibit, in our view, a rule 11 motion from being
9 even considered, much less granted, against Wigdor.

10 That will, obviously, be in opposition to the motion,
11 but there will not be any argument made that the severing of
12 the cases serves as some sort of basis to deny a rule 11
13 motion.

14 THE COURT: All right. Understood. Okay.

15 Does anyone else want to be heard further on the
16 severance motion? I don't think that's necessary, frankly,
17 because I think we're all in agreement, but --

18 MS. McKENNA: Your Honor, Kathleen McKenna. This
19 doesn't affect the severance motion, but with respect to your
20 question of how it affects subject matter jurisdiction, while
21 Mr. Vagnini is correct that they provided the right-to-sue
22 letter to the Court, and I just want to be candid that in our
23 forthcoming motion to dismiss, we think that that right-to-sue
24 letter was unlawfully issued by the EEOC, and we will be
25 putting that issue before the Court in our right-to-sue, it's

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1 also addressed in our rule 11.

2 THE COURT: All right. Okay. Thank you for noting
3 that for the record. And I will, of course, address that once
4 the motions are fully briefed.

5 Federal Rule of Civil Procedure 21 permits a court to
6 sever any claim against a party, and rule 42(b) allows the
7 court to order a separate trial of one or more severed issues,
8 claims, crossclaims, counterclaims or third-party claims. The
9 decision whether to grant a severance motion is committed to
10 the sound discretion of the trial court.

11 Because no party objects to severance and because, in
12 the Court's view, severance is warranted in light of the
13 distinct factual bases of each of plaintiffs' claims, I'm going
14 to grant the motion to sever.

15 So why don't we talk about next steps. So what's
16 going to happen next? Are each of the plaintiffs going to file
17 their own complaint?

18 MR. WILLEMIN: Your Honor, this is Michael Willemin
19 for plaintiff Eckhart. My only concern from the start, in
20 terms of severance and et cetera, was just to make sure that we
21 preserved our right to amend our complaint following the motion
22 to dismiss. And so to the extent -- I'm happy to file a
23 separate complaint, assuming that we will not be sort of
24 waiving our right to do that and then, you know, amend once we
25 receive a motion to dismiss, if warranted or necessary.

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1 Procedurally, I think that that makes the most sense.
2 I just want to be cognizant of the fact that a filing of a new
3 complaint and a single plaintiff complaint wouldn't waive our
4 right to amend following receipt of a motion to dismiss.

5 THE COURT: Do defense counsel wish to be heard on
6 that?

7 MS. McKENNA: Your Honor, it's for good housekeeping
8 purposes and good, sort of, procedural hygiene, it makes sense
9 to file two separate complaints. We leave that to your Honor,
10 as long as the newly filed complaints do not contain changes to
11 the complaint. That seems to be a housekeeping matter, and we
12 should do what your Honor thinks makes the most sense.

13 We are prepared to move with respect to the claims
14 raised by Ms. Eckhart and Ms. Areu on the current timetable,
15 which is the 19th. But if there are going to be newly filed
16 complaints, obviously, we should talk about scheduling, and we
17 should be clear about whether there are material changes
18 because then they wouldn't have the right to amend. I
19 understand Mr. Willemmin to be saying he would just file a clean
20 one that is the same as the one that's on file.

21 THE COURT: That's my understanding. Is that correct?

22 MR. WILLEMIN: This is Michael Willemmin. That's
23 correct. I mean, I would suppose, as long as there's no
24 objection, that the easiest way to do it would be to just file
25 Ms. Eckhart's complaint with only her name in the caption but

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1 have it be substantively identical to Ms. Areu's complaint,
2 except for eliminating any causes of action that are specific
3 to Ms. Areu or any factual allegations that, you know, are
4 specific to her, I suppose, and obviously, removing the word
5 "plaintiff" in front of her name.

6 But I think that that is -- and then have Ms. Areu do
7 the same thing, then receive motions to dismiss and then decide
8 from that point whether or not we want to make any amendments
9 to address issues raised in any motions to dismiss.

10 MS. FOTI: This is Cathy Foti, for Mr. Henry. So we
11 agree that if Mr. Willemin follows the procedure he just laid
12 out, that we do not have an objection to allowing him to
13 exercise his right to amend after the filing of our motion to
14 dismiss. Again, our main concern is that we don't extend the
15 date for the filing of the motion to dismiss.

16 Technically, I don't know if filing this new complaint
17 would be considered an amendment. If we can all agree that the
18 motion to dismiss would continue to be filed on October 19th,
19 we would not have an objection.

20 THE COURT: I think we can all agree on that. Is
21 there any objection to that, that we keep the same date for the
22 motion to dismiss as October 19th because nothing of substance
23 is going to change in these complaints?

24 MR. VAGNINI: Your Honor, this is Mr. Vagnini for
25 plaintiff Areu. If you're asking broadly, I did want to raise

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1 with your Honor today the issue of the class additions to the
2 complaint that we did not do in our original amendment just
3 simply because it was already a very complex matter; so we
4 didn't want to add into it at that point.

5 But there is a concern, and at plaintiff Areu's
6 request and upon our further investigation, it does appear
7 warranted that we would prefer to proceed under rule 23 and
8 amend the complaint accordingly. It wouldn't change anything
9 factually in terms of Ms. Areu's claims, but obviously, would
10 add a significant amount of class allegations and structure to
11 the complaint that is not in it presently.

12 MS. McKENNA: Your Honor, Kathleen McKenna. May I be
13 heard for the Fox defendants?

14 THE COURT: Yes.

15 MS. McKENNA: Your Honor, we would object to the
16 further amendment of the complaint to add class claims. This
17 issue was raised with you some time ago. If there were such
18 class claims to be made, they should have been raised before,
19 and they should not have the right to amend.

20 As of right, I think plaintiffs should have to
21 articulate for the Court the purported basis of these class
22 claims, and we should have an opportunity to be heard on that.
23 In any event, if your Honor is going to permit that to add
24 additional legal claims to the complaint, then candidly we're
25 not going to be able to file by the 19th, and it's not

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1 reasonable, I don't think, to ask us to do so.

2 MS. FOTI: Your Honor, this is Cathy Foti. I agree
3 with Ms. McKenna's position. My main concern is that we are
4 able to go forward in our motion to dismiss Ms. Eckhart's
5 claims.

6 To the extent, obviously, that Ms. Areu files
7 additional class claims, we also would not be able to respond
8 to those by the 19th. But we do not want that to change the
9 current schedule for Ms. Eckhart.

10 THE COURT: Okay. So listen, the schedule, there's no
11 reason that the schedule needs to be changed in any way with
12 respect to Ms. Eckhart, correct?

13 MR. WILLEMIN: This is Michael Willemmin for
14 Ms. Eckhart, and I would agree with that, your Honor.

15 THE COURT: All right. So why don't you file that
16 complaint just as to Ms. Eckhart. It will otherwise
17 substantively be the same. We'll get the motion to dismiss on
18 October 19th, and then do you want to talk about opposition and
19 reply and timing for that?

20 MR. WILLEMIN: I am fine talking about that. I mean,
21 I think if we get it on the 19th, we would request three weeks
22 from the 19th to either -- I mean, your Honor's individual
23 rules process if want to amend; so three weeks for the
24 opposition, and then we can do, if needed, your Honor's rules
25 amended process if we decide we need to go that route, but

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1 that's what we will be requesting.

2 THE COURT: All right. Is there any objection to
3 that?

4 MS. McKENNA: Your Honor, I don't understand why --
5 this is Ms. McKenna. I'm sorry, I'm making Rose crazy.

6 I don't understand why three weeks to either decide
7 they're going to amend or oppose is not a sufficient time
8 frame, particularly given the desire to move this with some
9 rapidity.

10 MR. WILLEMIN: I think there -- this is Michael
11 Willemin. I think there might have been a misunderstanding. I
12 was not suggesting that it would take me three weeks to decide
13 whether to amend. I believe your Honor's individual rules have
14 a process that parties go through when a motion to dismiss is
15 filed and, obviously, in the ordinary course, we would have, in
16 any event, 21 days as of right to amend following the receipt
17 of the motion to dismiss.

18 But I'm not suggesting that I need to take that long
19 to decide whether we amend or not. All I'm saying is if we
20 choose not to amend, that 21-day period we would ask for that
21 date to be set as the opposition date.

22 THE COURT: Yes. I think that's fine. I mean, that's
23 the amount of time that you have under the rules. Give me one
24 second. Let me get out my own rules so I can just quote it for
25 you here.

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1 MS. McKENNA: Yes, your Honor. I'm looking at your
2 rule 4(c) on page 3 of the individual rules. I want to make
3 sure I understood Mr. Willemin to be saying that the 14-day
4 period of notification is within the 21-day period to provide
5 his opposition that was being suggested.

6 THE COURT: Yes. That is correct. Right,
7 Mr. Willemin?

8 MS. McKENNA: Okay.

9 MR. WILLEMIN: Correct. Yes, we will notify, pursuant
10 to your Honor's rules, of any desire to amend the complaint or
11 the objections thereof within 14 days of receiving that
12 complaint. So that would be served by the 2nd of November.

13 And then to the extent that we decide to amend, we
14 will then, I think as your Honor rules indicate, it doesn't
15 change the time permitted under the rules. So it will be like
16 the 9th of November, and then if we decide not to amend, we
17 will oppose the motion to dismiss by the 9th of November.

18 THE COURT: All right. So we have a schedule with
19 respect to Ms. Eckhart's case, at least with respect to the
20 motion to dismiss.

21 Why don't we talk about Ms. Areu. It does seem like,
22 if you want to make such a substantive amendment, that I want
23 to hear Ms. Areu out on that and give the defendants the
24 opportunity to respond. Do you all want to meet and confer
25 about that and talk about the scheduling that you would propose

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1 with respect to that and Ms. Areu's case, more generally, and
2 then separately with respect to the rule 11 motion? Does that
3 make sense?

4 MR. VALLI: This is Robert Valli, your Honor. I have
5 no objection to that, but I want everyone to note that the
6 reason we did not raise class claims is because we had all
7 decided not to sever the cases. So we didn't bring class
8 claims with the Eckhart plaintiff because that would have been
9 improper. So to now say, hey, now you can't do it, seems a tad
10 unfair.

11 In terms of timing, I will certainly reach out to
12 defense counsel to discuss the rule 11 timing, the timing of
13 any amended complaint by plaintiff Areu, and any timing with
14 respect to a motion to dismiss.

15 MS. McKENNA: Your Honor? Kathleen McKenna.

16 THE COURT: Yes, go ahead.

17 MS. McKENNA: We, of course, will confer with counsel
18 for Ms. Areu as it relates to her desire to amend her complaint
19 to include class claims.

20 I'm not going to belabor the record except to say that
21 nothing that was discussed in the last conference or any orders
22 that were issued thereafter should have or would have precluded
23 Ms. Areu from asserting whatever these class claims are, but I
24 will be happy to meet and confer with her counsel about that.

25 I do not understand the need to meet and confer with

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1 respect to the rule 11. We have filed it. Ms. Areu's
2 opposition is due on the 13th, and our reply is due on
3 October 20.

4 THE COURT: Okay.

5 MS. McKENNA: And we're on that timetable.

6 THE COURT: Got it. All right.

7 MR. WILLEMEN: Your Honor, this is Michael Willemen.

8 THE COURT: Yes.

9 MR. WILLEMEN: I apologize to interrupt, but I think
10 as we noted in our letter of Monday, Ms. McKenna actually
11 sought this conference in part to discuss briefing schedule on
12 the rule 11 motion. So I did have an opportunity to confer
13 with counsel for Ms. Areu, and I believe we're in agreement,
14 although they can state if I'm incorrect, that we'd like to
15 request the opposition deadline be moved to the 23rd of
16 October. And, obviously, we would be in agreement on any
17 reciprocal extension, if asked for, on a reply. But I do think
18 that's something that we can discuss on this call.

19 THE COURT: Look, if we're just talking about a couple
20 of days here and there, I don't have an objection to that. So
21 why don't we have the opposition to the rule 11 motion due
22 October 23rd and then the reply October 30th.

23 Does anyone feel like they're not getting enough time?
24 I understand defendants want to move this along, but is there
25 any objection to that schedule?

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1 MS. FOTI: Your Honor, this is Cathy Foti. This is
2 just rule 11, right?

3 THE COURT: This is just rule 11.

4 MS. McKENNA: So nothing else?

5 THE COURT: Right. So we have a schedule on the rule
6 11 motion. We have a schedule to complete the briefing on the
7 motion to dismiss Ms. Eckhart's claim or an amendment, and then
8 you're going to meet and confer with respect to Ms. Areu.

9 I do want to receive the letters on amendment, or if
10 you want it to be a formal motion on amendment, as soon as
11 possible so that we can get a schedule in place promptly.

12 So I'm going to ask you to meet and confer. Go ahead.

13 MS. FOTI: Again, Cathy Foti. Can I just be clear on
14 the motion to dismiss schedule in terms of the -- so we know
15 when the opposition would be due, which is I guess the 16th.
16 In terms of reply -- sorry, the 9th the opposition is due; is
17 that correct?

18 THE COURT: I don't have a calendar in front of me.
19 Go ahead.

20 MR. WILLEMIN: This is Michael Willemin. That is
21 correct.

22 MS. FOTI: 9th. So in terms of a reply, to the extent
23 that we can agree it would be due on the 23rd?

24 MR. WILLEMIN: This is Michael Willemin again. I have
25 no objection to that.

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1 THE COURT: Okay. So the reply on that is
2 October 23rd.

3 (Indiscernible crosstalk)

4 Okay. All right. So we have two out of our three
5 schedules in place. What I would like is I would like a letter
6 no later than Friday proposing, I hope jointly, a schedule on
7 Ms. Areu's case, you know, whether it's a motion for leave to
8 amend, a motion to dismiss. But I'd like, ideally, if you can
9 reach agreement on that, that would be great.

10 If not, just tell me your positions in a letter, in a
11 joint letter, and I'll make a decision quickly on that so we
12 get a schedule in place as soon as possible.

13 MS. McKENNA: Your Honor, this is Kathleen McKenna.
14 Can I ask some indulgence? Can we make Friday, Monday?
15 Because I am committed, your Honor, all day tomorrow and all
16 day Friday --

17 THE COURT: That's fine. That's fine. We'll make the
18 date Monday. All right?

19 MR. VALLI: Your Honor, can we actually make -- I'm
20 sorry. This is Robert Valli. I apologize. That's actually a
21 holiday, and I am --

22 THE COURT: You're right.

23 MR. VALLI: -- taking off that Monday. Can we make it
24 Tuesday?

25 THE COURT: Yes.

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1 MS. McKENNA: I'm sorry.

2 THE COURT: No, no, you are right absolutely right.

3 Monday is a court holiday; so we will indeed make it Tuesday.

4 MR. VALLI: And everyone should know that it's my
5 birthday, and so on my birthday, I get whatever I want.

6 MS. McKENNA: I'll sing to you, Robert.

7 THE COURT: We'll all be very nice to you, and if we
8 meet, we'll each have cupcakes.

9 Okay. Is there anything else we need to talk about
10 today?

11 MR. WILLEMIN: This is Michael Willemin. Nothing else
12 for the plaintiff Eckhart.

13 MR. VALLI: This is Robert Valli. Nothing for
14 plaintiff Areu, your Honor.

15 MS. McKENNA: Kathleen McKenna. Nothing further for
16 the Fox defendants.

17 MS. FOTI: Cathy Foti. Nothing for Mr. Henry.

18 THE COURT: Okay. All right. Thank you, all, and
19 stay safe, everybody. Thanks, Rose. Bye.

20 (Adjourned)
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25